Pepperdine Law Review

Volume 7 | Issue 1 Article 6

12-15-1979

Drug Use and the Exclusionary Manque

Jerome A. Busch

Follow this and additional works at: http://digitalcommons.pepperdine.edu/plr

 Part of the Evidence Commons, and the Legislation Commons

Recommended Citation

Jerome A. Busch *Drug Use and the Exclusionary Manque*, 7 Pepp. L. Rev. 1 (1980)
Available at: http://digitalcommons.pepperdine.edu/plr/vol7/iss1/6

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact Kevin.Miller3@pepperdine.edu.

Drug Use and the Exclusionary Manque

In this unique consideration of two seemingly distinct subjects of legal interest, the author examines what proves to be a significant statistical and conceptual relationship between the sanctioning of victimless crimes, and the invocation of the exclusionary rule. The author opines that the debate surrounding the application of the exclusionary rule is, in part, a manifestation of the individual inclinations and opinions of the various legal thinkers concerning the fundamental validity of applying criminal sanctions to the perpetration of certain "victimless" activities.

> The confusion we thus generate in our own minds and lives, and in the minds and lives of those we touch through our legislation, treatment, or "common sense" could not be greater. For the folly into which we have fallen is of truly gigantic proportions: we have dethroned God and the devils. Our new goals and devils-our own creations, but mysterious monsters all-are the drugs we worship and fear.[1]

> This case has significance far beyond its facts and its holding. For more than 55 years this Court has enforced a rule under which evidence of undoubted reliability and probative value has been suppressed and excluded from criminal cases whenever it was obtained in violation of the Fourth Amendment.[2]

The unlikely juxtaposition of the above quotes suggests a neglected interplay of two perplexing problems that plague criminal justice in the United States. Few people would disagree with a statement that drug use in this country has increased dramatically during the last 15 years. Few would agree, however, upon what, if anything, should be done about it. Another similarly controversial subject is the legal principle known as the exclusionary rule. Although these areas of the law appear at first glance to be essentially unrelated, a closer examination reveals a connection, the study of which tends to clarify each area. This comment will demonstrate that the debate concerning the efficacy of the exclusionary rule is, in reality, merely a manifestation of another less

1. T. SZASZ, CEREMONIAL CHEMISTRY xv (1974).

2. Bivens v. Six Unknown Named Agents of the Bureau of Narcotics, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting). On November 26, 1965, agents of the Federal Bureau of Narcotics entered Bivens' apartment and arrested him for alleged narcotics violations. The agents manacled Bivens in front of his wife and children, and threatened to arrest the entire family. The family's apartment was searched without a warrant. Subsequently, Bivens was taken to the federal courthouse in Brooklyn, where he was interrogated, booked, and subjected to a visual strip search. On July 7, 1967, a suit was brought in Federal District Court alleging the arrest was "done unlawfully, unreasonably and contrary to law." *Id.* at 389.

aparent issue—the criminal status to be assigned to such "victimless crimes" as drug use. To accomplish this end, a particular format will be used.

As a first step, a capsule history of drug use legislation and enforcement will be presented. Such a history will more clearly outline a social context of drug use and official efforts to repress that use. Next, the history of the exclusionary rule will be developed as a useful counterpoint to the contemporaneous efforts at drug control. Subsequently, an analysis of several cases and research studies will be made which will suggest a certain degree of interplay between drug use and the exclusionary rule.

Once it is demonstrated that drug use and the exclusionary rule can be related statistically and conceptually, Herbert Packer's two models of the criminal process will aid in the organization of the raw data comprised of history, research, and cases.[3]

Finally, it will be suggested the confrontation over the exlusionary rule is essentially a debate over the necessity for criminal sanctions in various areas of the law. If the criminal sanctions are perceived as unfair and arbitrary, the foundations of the American legal system are somewhat weakened. At least one authority states that the inability to creatively resolve basic societal conflicts of this type has precipitated a crisis in the American legal tradition. The result that the United States is no longer able to maintain order and justice.[4]

The Criminalization of Drug Use

"The plain historical facts are that before 1914 there was no 'drug problem' in the United States; nor did we have a name for it."[5] The first federal control enactment was the Harrison Narcotics Act of 1914.[6] The Harrison Act was a tax statute that required manufacturers, distributors, and dispensers of opiates and co-

3. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 144-73 (1968). An explanation of the two models is provided in a later section of this comment. *See* text accompanying notes 79-102 *infra*.

4. Berman, *The Religious Foundations of Western Law*, 24 CATH. U.L. REV. 490, 507 (1975).

5. Mr. Szasz is more interested in attacking the prevailing medical notions about drug use or restriction than discussing its legal implications.

> The subject matter of ceremonial chemistry is thus the magical as opposed to the medical, the ritual as opposed to the technical dimensions of drug use; more specifically, it is the approval and disapproval, promotion and prohibition, use and avoidance of symbolically significant substances, and the explanations and justifications offered for the consequences and control of their employment.

T. SZASZ, *supra*, note 1, at xv.

6. Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785 (repealed 1970).

caine products to register with the Treasury Department and to keep records of transactions involving those substances. An exemption from this requirement was allowed to licensed physicians, provided the drugs were prescribed in the course of professional practice.[7] Pursuant to the Volstead Act,[8] Treasury agents expanded the modest sanctions of the Harrison Act until an all-out war on drugs had developed. Additionally, the Narcotics Division of the Treasury Department was influential in the articulation of a narrow definition of the licensed physician exception under the Harrison Act adopted in *United States v. Behrman*,[9] which restricted the freedom of doctors to prescribe opiates for the mere symptoms of addiction.

Although *Linder v. United States* subsequently overturned *Behrman* and called for a more liberal approach, it was not accepted as policy by the narcotics division.[10]

> Swayed by propaganda, enforcement policies, and public opinion, lower federal courts dismissed the implications of *Linder*. Few reputable doctors cared to challenge existing enforcement practices because many of their colleagues were being convicted and jailed for prescribing narcotics.[11]

In August, 1930, the Bureau of Narcotics was separated from the Bureau of Prohibition as the result of scandals involving narcotics

7. King, *The American System: Legal Sanctions to Repress Drug Abuse*, DRUGS AND THE CRIMINAL JUSTICE SYSTEM 21 (1974).

8. National Prohibition Act of 1919, Pub. L. No. 66-66, 41 Stat. 305 (repealed 1933).

9. 258 U.S. 280 (1922). In *Behrman*, the Court was persuaded to accept the government's position that doctors would only administer controlled drugs to patients for symptoms other than addiction.

10. 268 U.S. 5 (1925). The Court unamimously rejected the conviction of Dr. Charles Linder for prescribing morphine to a patient who was a government informer. The Court decided Dr. Linder had not transcended the limits of professional conduct and Congress had never intended to interfere with a doctor's professional judgment. However, a Dr. Williams published a book criticizing the Bureau of Narcotics' policy of prosecuting doctors for prescribing narcotics to addicts. Williams asserts that between 1918 and 1938 about 25,000 registered physicians were prosecuted for violation of federal laws. While the number of arrests cited by Dr. Williams cannot be confirmed, the Bureau of Narcotics' annual reports suggests that physicians and pharmacists were major targets of arrest. H. WILLIAMS, DRUG ADDICTS ARE HUMAN BEINGS (1939).

11. Reasons, *The Addict as Criminal: Perpetuation of a Legend*, CRIME IN AMERICA 126 (B. Cohen ed. 1977). *See also* J. WEISSMAN, DRUG ABUSE: THE LAW AND TREATMENT ALTERNATIVES 116-139 (1978). For a more thorough discussion of the history of drug control in the United States *see* D. MUSTO, THE AMERICAN DISEASE: ORIGINS OF NARCOTIC CONTROL (1973) and R. KING, THE DRUG HANGUP: AMERICAS FIFTY-YEAR FOLLY (1972).

agents.[12] The reorganized agency was headed by Harry J. Anslinger, former assistant commissioner of the Bureau of Prohibition. Anslinger was to remain the head of the agency for the next thirty-two years. The official policy of the bureau quickly became synonymous with Anslinger's personal philosophy. He felt the drug user was an "immoral, vicious, social leper" who could not escape responsibility for his actions and who must feel the swift, impartial punishment.[13] The result was that the Bureau of Narcotics, through Anslinger, encouraged drug use to become a criminal activity.

During the 1930's a new "drug problem" evolved with the increased usage of marijuana. The Bureau escalated its attack on drug use by declaring marijuana as the newest "dangerous drug." In its 1936 annual report the Bureau depicted the drug user as a "violent addict."[14] A section of the report dealt with marijuana-linked crimes using shocking accounts of brutal murders and violent attacks to that resulted from marijuana use.[15] The resultant furor prompted Congress to respond with the Marijuana Tax Act.[16] Marijuana consequently became part of the same system of enforcement that had previously controlled opium and cocaine through the Harrison Act. The Marijuana Tax Act, placed a high tax on the drug and created a new class of "criminals." Anslinger considered marijuana use as "crime, beastiality, and insanity" and considered its users as "degenerates."[17]

> In law the Federal Bureau of Narcotics had completely routed the forces of evil. It had shaped a law to its liking and had even triumphed over the scientific method which presumed to question the moral truths of the Bureau. The atmosphere was so clouded that serious investigations into marijuana remained stifled for almost twenty years. The dedicated entrepreneurs within the Bureau had sold their beliefs not only to Congress and the public, but to a large part of the scientific establishment as well.[18]

Little was heard of a "drug problem" again until the early 1950's when the Kefauver Committee on Crime launched an investigation into narcotics and marijuana use, the results of which caused a great deal of public apprehension. Anslinger supplied much of

12. J. WEISSMAN, *supra* note 11, at 126, n.6. A federal grand jury in 1930 revealed narcotics agents had padded arrest records and were in collusion with illegal sellers.

13. J. WEISSMAN, *supra* note 11 at 127.

14. "Sensational articles and newspaper accounts have harped upon the theme of the 'dope crazed killer' or the 'dope fiend rapist' until the public has learned to depend upon this sort of literature as it depends upon the output of fanciful detective mysteries." Lindesmith, *Dope Fiend Mythology*, 31 J. CRIM. L. C. & P. S. 199 (1940).

15. Reasons, *supra* note 11, at 123.

16. Marijuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (1937).

17. Schaller, *The Federal Prohibition of Marijuana*, J. SOC. HIST. 68 (Fall 1970).

18. *Id.* at 74.

the information used by the committee.[19] He testified that although there had been a decrease in the addiction rate for a number of years, the trend more recently was reversing itself and with an alarming increase of addiction among "young hoodlums."[20] As a result of the hearings, Congress passed the Boggs Act, which fixed mandatory sentence ranges for *all* federal drug violations.[21] Other "get tough" legislation followed. In 1956, for example, the Narcotics Control Act was passed and penalities even more severe and inflexible were promulgated.[22]

In early 1968 President Lyndon Johnson used his powers under the Reorganization Act to abolish both the old Bureau of Narcotics in the Treasury Department and the more recent Bureau of Drug Abuse in the Food and Drug Administration. These were replaced by a single Justice Department related agency known as the Bureau of Narcotics and Dangerous Drugs (BNDD).[23] Later in 1968, when Richard Nixon was elected President, another "war on drugs" was proclaimed to combat a "serious national threat." Robert DuPont, Director of the White House's Special Action Office for Drug Abuse Prevention could claim that President Nixon's anti-drug program had met with success as witnessed by a substantial reduction in the number of heroin addicts.[24] Professor James Wilson praised the Nixon program as a model of narcotics control. This program employed a two-pronged approach which combined a massive law enforcement effort to reduce the availability of heroin with a similarly massive attempt to substitute the use of methadone.[25] By 1976, however, DuPont found that heroin

19. Reasons, *supra* note 11, at 129.

20. *Id.* at 129.

21. Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 (repealed 1970).

22. Narcotics Control Act of 1956, Pub. L. No. 84-725, 70 Stat. 567 (repealed 1970). The "get tough" approach was subsequently adopted by most states by enacting the Uniform Narcotics Law which was patterned after the federal law.

23. The agencies were merged to provide for more efficient and effective law enforcement. The new agency was in the Department of Justice, where the criminal approach was continued. Reasons, *supra* note 11, at 131.

24. In 1969 the BNDD reported that there had been 68,088 addicts. In 1970 the number was raised to 315,000 and in 1971 the total reached 559,000. According to Edward Epstein what had happened was that the BNDD managed their data and applied a new formula to the old 1969 data. Their assumption was that only about one addict in five was known to authorities, so that the 1969 data was multiplied by 4.626 to yield the new "epidemic" total of 315,000. The next year the BNDD revised the ratio of 8.2 and multiplied that figure by 315,000 to get the 1972 total of 559,000. The same sort of data manipulation was later used to reduce the addict population to prove the Nixon program a success. E. EPSTEIN, AGENCY OF FEAR 173-77 (1977).

25. J. WILSON, THINKING ABOUT CRIME XV-XVI (1974).

use was spreading at an alarming rate despite the efforts by law enforcement officials in the Nixon administration.

> One reason the trends are so volative is that they are based on conjecture rather than hard data. Indeed, the "alarming trend" of increased addiction to which DuPont referred was the product of a politically induced change in the statistical procedures used by the Federal Bureau of Narcotics and Dangerous Drugs (BNDD) to estimate the number of addicts, not of any sudden jump in heroin use.[26]

Indeed, it appears that the BNDD, with encouragement from the White house, had manipulated the statistics so as to produce the appearance of a decline in the addict population in 1973. This manipulation seems to have been motivated by political expediency.[27]

The Comprehensive Drug Abuse Prevention and Control Act of 1970[28] was the first major drug legislation enacted since the Harrison Act. It removed the tax based method of control while also eliminating all prior drug legislation. Although penalties for drug use were generally reduced, drug use remained an essentially criminal activity. A new Uniform Controlled Substances Act was drawn up paralleling the federal law and bringing local drug enforcement within the federal framework.[29]

This summary of drug use legislation is not intended to downgrade legitimate fears about increasing use of drugs in the United States. Rather, it works to demonstrate that the efforts to control drug use have consistently utilized criminal sanctions and that legislation and enforcement efforts were often infused with political rhetoric rather than with careful, scientific thought.

The Exclusionary Rule—Selected Judicial Opinions

The exclusionary rule first appeared as dicta in *Boyd v. United States*.[30] It was not, however, until 1914, in *Weeks v. United States*, that an unanimous Court adopted an exclusionary rule based on fourth amendment principles, rejecting the common law doctrine that all evidence was admissible regardless of the manner in which the evidence was obtained.[31] The essence of the decision was that enforcement of the law, with regard to search and seizure, is subject to the restrictions of the Fourth Amendment. The Court stated that federal courts could not sanction depar-

---

26. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 175 (1976).

27. Epstein, *supra* note 24, at 177. Epstein has documented the Nixon "war" on heroin in great detail, concluding that it was a cynical attempt to create the illusion that the Administration was tough on crime.

28. Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C.A. § 801 (1970) (Amended 1974).

29. Uniform Controlled Substances Act § 201 (1970).

30. 116 U.S. 616 (1886).

31. 232 U.S. 383 (1914). *See* note 49 *infra* .

tures from the Constitution in the name of enforcement since those very same courts were sworn to uphold the Constitution.

This argument was similar to later justifications of the exclusionary rule founded upon the principle of "judicial integrity."[32] The emphasis on a constitutional basis for the exclusionary rule was explicit in *Weeks* where the Court stated:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[33]

It is important to realize that the genesis of the exclusionary rule was not specifically rooted in a concept of deterrence, as the term was used in later cases.

Nevertheless, the constitutional basis of exclusionary rule was not effectively articulated in the *Weeks* opinion and later decisions consequently drifted into other rationales. The case of *Wolf v. Colorado*, though primarily dealing with fourteenth amendment problems, examined the basis for the exclusionary rule.[34] Justice Frankfurter's majority opinion denied that the exclusionary rule was explicitly required by the fourteenth amendment. Rather, it was a requirement arrived at by judicial implication.[35] In Justice Black's concurring opinion he declared that the exclusionary rule was merely a judicially created rule of evidence and not a constitutional requirement.[36]

In *Mapp v. Ohio*,[37] the Supreme Court extensively discussed the foundations of the exclusionary rule. *Mapp* required the states to adopt the exclusionary rule and established this requirement as inherent within the fourth amendment. The Court's opinion cited *Weeks* as part of an argument that supported the exclusionary rule as a constitutional requirement. The Court examined the possibility of a government destroying itself through disregard of its own principles,[38] referring to the government as a

32. *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961).
33. 232 U.S. at 393.
34. 338 U.S. 25 (1949). *See* note 51 *infra*.
35. *Id.* at 28.
36. *Id.* at 39 (Black, J., concurring).
37. 367 U.S. 643 (1961). *See also* note 53 *infra*.
38. *Id.* at 659.

teacher which could instill contempt for the law if it breaks the law itself.[39] For the first time the Court also spoke of the exclusionary rule as a "deterrent safeguard."[40] While the constitutional argument is central to the reasoning in *Mapp*, it is far from clear what the Court intended as its rationale for the exclusionary rule. It is not surprising that *Mapp* comes under attack from those who object to the exclusionary principle generally and to its efficacy as a practical deterrent to official lawlessness in particular.

With a new Chief Justice and a reconstituted Court, the opportunity to critique the rule was presented in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*.[41] The holding in the case allowed a cause of action under the fourth amendment for damages resulting from a Federal Bureau of Narcotics entry and search of the petitioner's apartment, all of which occurred without warrant. Chief Justice Burger took the opportunity in his dissent to examine the exclusionary rule and to present an alternative. He stated the exclusionary rule was based on a theory of deterrence. This basis, he asserted, was both "conceptually sterile" and "practically ineffective."[42] His objections included contentions that the rule did not apply any direct sanction to the individual officer involved in illegal conduct, that the police could not grasp the technical nature of the rule, that the rule was not useful in large areas of law enforcement that does not result in criminal prosecutions, and the rule was applied equally to flagrant violations and to inadvertant errors.[43] In effect the Chief Justice stated that the exclusionary rule was unworkable and irrational. As an alternative, he suggested adoption of the American Law Institute's Model Pre-Arraignment Code.[44] According to Chief Justice Burger, adoption of this model would narrow the application of the exclusionary rule so it would apply only to substantial violations, based on a balancing of interests involved.

In *United States v. Calandra*[45] the Court majority stressed the rationale of deterrence, and the failure of the exclusionary rule to act as a deterrent. The Majority determined that "the rule is a ju-

39. Olmstead v. United States, 227 U.S. 438, 485 (1926).
40. *Id.* at 648, 651.
41. 403 U.S. 388 (1971).
42. *Id.* at 415.
43. *Id.* at 416-18 (Burger, C.J., dissenting). *See also* Burger, *Who Will Watch the Watchman*, 14 AM. U.L. REV. 1 (1964) for an earlier statement of the same ideas.
44. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 8.02 (2) and (3) (Tentative Draft No. 4, 1971), cited in 403 U.S. at 424. Under the Code, a court would only grant a motion to surpress if the violation was substantial.
45. 414 U.S. 338 (1974).

dicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party agrieved."[46] The dissent by Justice Brennan forcefully argued that the majority erred when they treated the exclusionary rule as a mere judicial remedy rather than as a constitutional right under the Fourth Amendment.[47]

The foregoing analysis of exclusionary rule cases was intended not to be exhaustive, but to indicate the shifting rationale between the *Weeks* and *Calandra* decisions. *Weeks* stressed intrinsic constitutional principles whereas *Calandra* presented the new focus on the public policy considerations of deterrence. Nevertheless, Brennan's dissent in *Calandra* indicates that the debate has not been resolved satisfactorily. Hopefully, examination of the divergent views in this area will result in a fuller understanding of the interrelationship between the exclusionary rule and drug use crimes.

Those Protected by the Exclusionary Rule

As the above two sections amply illustrate, the criminalization of drug use and the controversy surrounding the exclusionary rule were topics that generated controversy. It is ironic, however, that both drug legislation and the exclusionary rule were created in the same year, 1914, and were conceived independently of any common law tradition. Beyond the ironies of history and circumstance there can be seen a closer connection between drug use, as a victimless crime, and the exclusionary rule.[48] Drug use is cur-

46. *Id.* at 348.
47. *Id.* at 360.
48. All attempts to define victimless crime have run into trouble. One suggestion has been to designate crimes as victimless if there is no victim in the usual sense. But Silberman observed:

> Another formulation that has become popular in recent years is no more helpful, i.e., that the activities in question should not be considered criminal because there is no "victim" in the usual sense. It is true that both parties consent to transactions such as prostitution, gambling, and the sale of heroin, but the same can be said of a number of other offenses not normally categorized as "victimless crimes," e.g., bribery of public officials, sale of stolen merchandise, and the illegal sale or possession of guns. With these offenses, the fact that the "victim" consents to the transaction does not mean that no one is harmed; the same may be said of prostitution, heroin sale and/or a number of other victimless crimes.

Silberman, *supra* note 26, at 187.

A more general definition would be those activities over which large segments of

rently recognized as one of the more obvious examples of victimless crimes. Thus, it is enlightening, to look at major cases discussing the exclusionary rule, listed below, to see if a correlation can be drawn between the exclusionary rule and victimless crimes (particularly drug use).

Case	Basis for Original Search
1. Weeks v. United States[49]	Gambling Lottery Tickets
2. Nardone v. United States[50]	Smuggling Alcohol
3. Wolf v. Colorado[51]	Abortion (performed by a physician)
4. Elkins v. United States[52]	Obscene Motion Pictures
5. Mapp v. Ohio[53]	Lewd Books and Pictures
6. Wong Sun v. United States[54]	Possession of Narcotics

Americans have disagreed as to whether the criminal sanction should be applied. These activities have generally been labeled "sin" or "vice," and include gambling, public drunkeness, prostitution, homosexuality and drug use.

49. 232 U.S. 283 (1914). Weeks was charged with using the mails for the purpose of transporting chances in a lottery. He was arrested without a warrant at his place of employment. Meanwhile police officers went to Weeks' residence and, without warrants, entered his house on two different occasions during the day and took possession of various papers and documents.

50. 302 U.S. 379 (1937). Nardone was charged with the concealment and smuggling of alcohol. Evidence against Nardone was obtained from witnesses who had tapped his telephone and overheard incriminating conversations. The trial court admitted the evidence over objections by the defense.

51. 338 U.S. 25 (1949). Wolf was a practicing physician specializing in obstetrics. The district attorney believed Wolf had been performing abortions. Officers were sent to Wolf's office where they seized his daybook covering the years 1943 and 1944. These were seized without a warrant. They represented records of patients who consulted him professionally. The defense contended the seizure and use of the daybooks was reversible error.

52. 364 U.S. 206 (1960). State officers were convinced that Elkins and Clark had possession of obscene motion pictures. They obtained a search warrant and searched Clark's house. No motion pictures were found but several tape and wire recordings were seized. The state court held the search unlawful and the indictment was dismissed. During the state proceedings, federal officers obtained a federal search warrant and seized the evidence from a safe deposit box where the state officers had placed them.

53. 367 U.S. 643, 644 (1961). Three Cleveland police officers arrived at the Mapp's residence seeking to question the Mapps about a recent bombing. Ms. Mapp denied the officers entry. Later that afternoon the officers forcibly entered the house without a warrant. Ms. Mapp's attorney arrived at the house but the officers refused to permit the attorney to see Ms. Mapp. Ms. Mapp was forcibly taken upstairs to her bedroom where the officers searched the room. The search spread to the rest of the second floor where the obscene materials seized were ultimately found.

54. 371 U.S. 471, 473 (1963). Federal narcotics agents arrested one Hom Way for heroin possession. Hom Way said that he had received heroin from one Toy. Agents went to Toy's laundry, broke down the door, and arrested Toy. Toy impli-

7. Bivens v. Six Unknown Agents[55]	Suspicion of Narcotics Possession
8. United States v. Calandra[56]	Illegal Gambling
9. United States v. Janis[57]	Book Making

It is not unreasonable that the criminal charges in all the cases listed above could be styled as victimless crimes.[58] The three major categories that are evident are: gambling, pornography, and drug use. It is tempting to argue that the above crimes should appear most often, since mere possession of gambling equipment, drugs or obscene material is the essence of the crime itself, and those activities would naturally become the object of more searches and seizures. Robbery, burglary, larceny and receiving stolen goods are also crimes that in one way or another involve possession of goods that would be the subject of searches and seizure. Yet these crimes do not appear in the list at all.

The listing of major cases and the attendant criminal charges is illustrative of the relationship between victimless crimes and the invocation of the exclusionary rule. One case in particular has provided a significant insight into the debate over the exclusion-

---

cated Yee, who in turn implicated Wong Sun as the one who had provided Yee with the heroin. Several days later when Wong Sun was being interrogated, after being advised of his legal rights, he gave an unsigned confession.

55. *See* note 2 *supra.*

56. 414 U.S. 338, 340 (1974). Federal agents obtained a search warrant to search the place of business of Mr. Calandra. Calandra was suspected of conducting extensive illegal gambling operations. The object of the search was the seizure of bookmaking records or paraphernalia. The agents discovered no bookmaking evidence, but instead found some evidence of loansharking activity. Calandra refused to answer questions about loansharking activities before the grand jury, stating that the search exceeded the scope of the warrant. The trial court refused to make Calandra answer the questions, but the Supreme Court reversed.

57. 428 U.S. 433, 434 (1976). Los Angeles police officials obtained a warrant, based on an affidavit made by an officer, to search the Janis apartment for bookmaking evidence. Betting records were found and Janis was arrested. However, the warrant was subsequently quashed on the grounds that the affidavit did not contain sufficient detail for the issuing magistrate to make an independent judgment about the information supplied. Stone v. Powell, 428 U.S. 465 (1976), was not listed because the holding was limited to the narrower issue of whether the exclusionary rule could have been raised in a federal habeas corpus petition where the defendant had an opportunity for full and fair litigation of fourth amendment claims in the state court.

58. Although some may consider abortion a crime with a victim, the court in Roe v. Wade dispensed with abortion as violation of criminal law and announced that it was permissible under the mother's constitutional right to privacy. 410 U.S. 113 (1973).

ary rule and has provided valuable research information which connects the rule with drug use and other victimless crimes. As previously mentioned, Chief Justice Burger used his dissent in *Bivens v. Six Unknown Agents* as a vehicle to announce his opposition to the exclusionary rule.[59] Chief Justice Burger's dissent is well summarized by his quotation of Cardozo:

> The criminal is to go free because the constable has blundered . . . A room is searched against the law and the body of a murdered man is found . . . . The privacy of the home has been infringed, and the murderer goes free.[60]

Bivens is a decision whose importance reaches beyond the facts of the case itself. In his dissent, Chief Justice Burger buttressed his argument that the exclusionary rule did not deter unlawful police conduct by citing Professor Oaks who expressed "disenchantment" with the rule.[61] The research by Oaks lent convincing empirical evidence to the assertion that the exclusionary rule failed as a deterrent, yet provides evidence of a relationship between the exclusionary rule and drug use.[62] While Oaks focused his research on the deterrent effect of the exclusionary rule, he also presented statistics that indicated the use of the rule was concentrated in three crimes.

> Court statistics show the astonishing extent to which the exclusion of evidence—as measured by the incidence of motions to suppress is concentrated in a few crimes.
>
> [The statistics show] that over 50 per cent of the motions to suppress in Chicago and the District [of Columbia] were filed in cases involving narcotics and weapons, even though these crimes accounted for a comparatively small proportion of the total number of persons held for prosecution. In Chicago an additional 26 per cent of the motions to suppress were filed in gambling cases, which account for only 1 per cent of the national total of persons held for prosecution.[63]

In Chicago narcotics, gambling and weapons offenses accounted for 78% of all motions to suppress. In the District of Coumbia these crimes accounted for 64% of all motions to suppress.[64] It is

---

59. 403 U.S. at 411 (Burger, C.J., dissenting).

60. People v. Defore, 242 N.Y.2d 13, 21, 23-24, 150 N.E. 585, 587-88 (1925), cited in *Bivens*, 403 U.S. at 413.

61. 403 U.S. at 426-27.

62. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Oaks' study is widely cited and concludes (although the data neither supported nor reputed the deterrent effect of the exclusionary rule) that the rule was a failure as a deterrent.

63. *Id.* at 681, 683. The weapon related crimes in Oaks study were for the possession of weapons, not for the use of weapons in separate crimes. However, it could be argued that the weapons had the potential to be involved in various crimes and the crimes should not be termed as "victimless." Even if the weapons category was not considered a victimless crime, the two crimes of gambling and narcotics use still account for 50% of the motions to suppress in the Oaks study of Chicago.

64. *Id.* at 682.

clear that if the courts are freeing criminals because of the exclusionary rule, only certain types of criminals are being freed.

A subsequent study by Professor Spiotto examined only data in Chicago and used a more extensive base.[65] The Spiotto research concluded that the exclusionary rule did not deter police misbehavior. It also provided some enlightening data on the increase of motions to suppress for illegal search and seizures in specified categories. Spiotto chose a three month period during 1971 and calculated the percentage of all motions to suppress for a variety of crimes. For preliminary hearings the data was: narcotics - 57%, unlawful possession of weapons - 23%, and gambling - 16%. These three categories again accounted for a large percentage (96%) of the motions to suppress.[66] More importantly, the data

Distribution of Motions to Suppress Among Various Crimes in Chicago and District of Columbia, 1969-70

	Proportion of Total Motions to Suppress		Proportion of Total Persons Held For Prosecution
Offense	Chicago	District of Columbia	(United States)
	%	%	%
Narcotics	24	35	1
Weapons	28	26	1
Gambling	26	4	1
Disorderly Conduct	11	*	10
Theft, Burglary, Receiving and Other Property Offenses	4	19	15
Assault	*	1	6
Two or More of Above Crimes	*	15[b]	—
All Other Crimes	7[a]	*	66
Total	100 (649 motions in 12 court days)	100 (69 motions in 12 months)	100 (2.3 million persons)

* Signifies less than .5%
a No other category exceeded 2%
b Consists of motions in cases involving two or more types of charges; property and narcotics, 4%; property and weapons, 3%; property and assault, 3%; other combinations, 5%.

65. Spiotto, *Search & Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243 (1973).

66. *Id.* at 250. Once again the unlawful possession of weapons could be con-

indicates that arrests for drug use occupy an increasing percentage of the court challenges to the exclusionary rule. As Spiotto observed:

> Narcotic offenses reveal both the largest number of motions made and the highest percentage sustained in the selected courts. Unlawful possession of a gun ranked second in the number of motions to suppress made, but only 61 percent were sustained.
>
> In Narcotics Court, while the number of motions to suppress made was roughly proportional to the number of defendants in each category of offense, defendants charged with the more serious narcotics offenses such as possession of heroin (the second most common narcotics offense), had 100 per cent of their motions granted, while those charged with less serious narcotic offenses had a lower percentage granted (possession of marijuana felony: 78 per cent; possession of dangerous drugs: 56 per cent; possession of marijuana misdemeanor: 93 per cent).[67]

The Spiotto article was an unabashed attack on the efficiency of the exclusionary rule as a deterrent. The Oaks research analysis came to no general conclusion about the efficiency of the rule as a deterrent, but, nonetheless, held for its abolition.[68] Chief Justice Burger used this reasoning in *Bivins* to suggest that the exclusionary rule had failed as a deterrent.

A contrary view was taken in an article by Bradley Canon, who sought to demonstrate that the Oaks and Spiotto studies were flawed, primarily because their evidence was drawn from an insufficient sample.[69] Of more immediate concern, Canon's observations linked the deterrent effect of the exclusionary rule with narcotics use. Canon stated:

> As an explanatory factor, the narcotics phenomenon is not mutually exclusive to the exclusionary rule. While increased use of narcotics is undoubtedly the immediate cause behind the increase in the use of search warrants in a great many cities, it can be asked: why do police seek

---

sidered a suspect category. If possession of weapons was dropped from consideration, gambling and narcotics still accounted for 73% of the motions to suppress.

67. *Id.* at 262.

68. Oaks, *supra* note 60, at 755.

69. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 698 (1974). The Canon article is a determined effort to repute critics of the rule and cast doubt on the viability of past empirical research on the deterrence factor of the exclusionary rule. Canon mentioned an earlier study carried out by Columbia University Law School students; Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COL. J.L. SOC. PROBS. 87 (1968). In that study the students found that the number of post-*Mapp* narcotics arrests declined about 50% according to the Narcotics Bureau, although Uniform and Detective Bureaus were substantially unchanged. What had changed was the content of police reports. Before *Mapp* arrest reports indicated 40% of the contraband was hidden on the person or in the premises. The figure dropped to around 10% after *Mapp*. Also reports that the defendant dropped or otherwise visably disposed of the evidence climbed from 10% (pre-*Mapp*) to about 35% (after *Mapp*). *Id.* at 94. Canon believes that the exclusionary rule had a great impact on narcotics arrests in New York City; if only at the level where police took notice of it and then fabricated their testimony to match *Mapp* requirements. For further discussion *see* Comment, *Police Perjury in Narcotics "Dropsy" Cases: A New Credibility Gap*, 60 GEO. L.J. 507 (1971).

> search warrants in narcotics cases rather than operating without them. In good part at least the answer lies with judicial decisions governing the legally seized material from evidence. In other words, the narcotics phenomenon explains to a large extent the tremendous increase in police use of search warrants during the past half dozen years, but it does not explain police decisions to seek search warrants rather than operate without them. The exclusionary rule explains this.[70]

A Suggested Model

What has been suggested in the preceeding section is that there exists a significant statistical connection between drug use crimes and the employment of the exclusionary rule through motions to suppress at preliminary hearings or at trial.[71] The bare assertion of a statistical correlation, however, has not resolved the ambiguity about drug use crimes and the exclusionary rule. On the one hand the exclusionary rule was thought to uphold judicial integrity and to a minor extent, maintain deterrence. But another judicial faction stressed deterrence in preference to the judicial integrity doctrine. Moreover, the Court in *Mapp* thought the exclusionary rule would work as a deterrent, although they did not specifically indicate whether the rule was for deterrence or for judicial integrity. More recently, Chief Justice Burger has led the attack against the rule based upon his view that it has failed as a deterrent to police misadvanture. Threading its way through the legal controversy has been the implacable fact that discussion concerning the exclusionary rule cannot be separated from the actual defendants for whose benefit the rule was intended.

The center of the controversy and its implications has been *political* in the broadest sense. President Gerald Ford, for example, epitomized one aspect of the political drama when he spoke before Congress in 1975. Ford stated that: "For too long, law has centered its attention more on the rights of the criminal defendant than on the victim of crime. It is time for law to concern itself more with the rights of the people it exists to protect."[72] Charles Silberman suggested that such arguments, in reality, express ideological preferences rather than actual facts since few criminals actually escape punishment because of the exclusionary rule.[73]

70. Canon, *supra* note 67, at 714. For evidence of the heavy role of narcotics in search and seizure problems in Los Angeles *see* Silberman, *supra* note 22, at 264.

71. *See* notes 63, 66 *supra*.

72. The President's Special Message to the Congress (June 19, 1975), *reprinted in* 11 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 653 (1975).

73. Silberman, *supra* note 22, at 262. Silberman musters impressive evidence

In a similar vein, another authority has asserted that the debate about drug use reflects myths derived from different segments of an acquisitive and competitive society.[74]

When a specific area of legal controversy is also a subject of broad political importance, statistical evidence should be supplemented by a conceptual scheme. Judge David Bazelon has observed: "Society is inhabited by human beings, and its problems are therefore human problems. Crime cannot be understood merely as a class of statistical events."[75] What is necessary is a

---

from studies that in fact, for crimes against the person or against property, the exclusionary rule does not let criminals go free in those categories. The one significant exception is for drug use crimes where the rule does have a more important place. *Id.* at 264.

74. Professor Incardi stated that these beliefs emerged from various sources:

> . . .
> [F]rom the more rural creeds of nineteenth-century Methodism, Baptism, Presbyterianism, and Congregationalism which emphasized individual human toil and self-sufficiency while designating the use of intoxicating substances an an unwholesome surrender to the evils of an urban morality;
> . . . .
> [F]rom the medical literature of the late 1800's which arbitrarily designated the use of morphine and opium as a vice, a habit, an appetite, and a disease;
> . . . .
> [F]rom the early association of opium smoking with the Chinese—a cultural and racial group which had been legally defined as alien until 1943 and even today is perceived of as odd and mysterious;
> . . . .
> [F]rom the direct effects of American narcotics legislation which served to define all addicts as criminal offenders;
> . . . .
> [F]rom nineteenth- and twentieth-century police literature which stressed the involvement of professional and habitual criminals with the use of drugs;
> . . . .
> [F]rom the initiative of moral entrepreneurs and moral crusaders who defined drug use as evil, and hence influenced and directed the perceptions of both local and national opinion makers and rule creators;
> . . . .
> [F]rom the publicized findings of misguided research efforts, those contaminated by the use of limited and biased samples, impressionistic data, methodological imbalances, and inexperienced practitioners;
> . . . .
> [F]rom the sacred repository of intellectual and cultural lag—the gap which persists between the generation and publication of new data and ultimate dismissal of earlier proclamations;
> . . . .
> [F]rom the suppression of controversial or disquieting knowledge by the cohorts of private, public, and corporate bodies whose internal interest structures are more effectively supported by alternative and distorted conceptions of reality.

J. Incardi, *Drugs, Drug-Taking and Drug-Seeking: Notations the Dynamics of Myth, Change and Reality* in DRUGS AND THE CRIMINAL JUSTICE SYSTEM, 206 (1974).

75. Bazelon, *The Hidden Politics of American Criminology*, in THE EVOLUTION OF CRIMINAL JUSTICE 18 (1978).

conceptual model that can make sense of the devisive debate over the exclusionary rule and at the same time incorporate the statistical evidence. A suitable conceptual framework has been developed by Herbert Packer.[76] Packer has developed two models of the criminal process which he designates as the Due Process Model and the Crime Control Model. These models are conceived as polar opposites of the reality they represent. Packer acknowledges the difficulties inherent in polarization, stating: "There is a risk in an enterprise of this sort that is latent in any attempt to polarize. It is, simply, that values are too varied to be pinned down to yes-or-no answers. The models are distortions of reality."[77] Yet, Packer has attempted to clarify the discussion of the criminal process by isolating the assumptions that underlie "competing policy claims" and examining the conclusions that follow from his analysis.[78]

1. The Crime Control Model

The principal concern of the Crime Control Model has been the suppression of criminal conduct. This is the most important function of the criminal process. Suppression of criminal conduct preserves social order and is, thus, a "positive guarantor of social freedom."[79] Primary consideration should be given to efficiency. In order for the model to operate successfully it must produce a high rate of apprehensions and convictions. There should also be a minimum opportunity for challenge to promote finality. The model presumes guilt upon arrest because of the high value placed upon initial administrative fact-finding processes. In order to enhance the administrative fact-finding process it is of crucial importance to limit restrictions on police and prosecutors, except for those which promote reliability.[80]

The Crime Control Model has many laudable aspects, especially in its emphasis on public security and the general knowledge by the public that criminals will be punished. The model does not, however, delve too deeply into the nature of the crime.

76. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149 (1968). FOR THE ORIGINAL FORMULATION *see* Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).
77. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149, 153 (1968).
78. *Id.* at 154.
79. *Id.* at 158.
80. *Id.* at 162.

In its most pristine state the theory behind the model assumes the inherent rationality of the criminal sanction. Any questions concerning the proper limits of the criminal sanction are presumptively entrusted to the legislature.

One would be hard pressed to find a more vigorous champion of the Crime Control Model than Chief Justice Burger. Although his critical stance toward the exclusionary rule has been evidenced in other decisions, notably *Brewer v. Williams*,[81] his most effective dissent to date remains that in *Bivens*.[82]

In this opinion, the Chief Justice, after allotting one paragraph to his dissent from the actual holding in the case, devoted the remainder of his energies to criticizing the exclusionary rule, even though the rule was not directly at issue in the case.[83]

> Some clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals. But there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials.[84]

For the Chief Justice, the important aspect of evidence is its *probative value* and *reliability*. He placed a high value on the administrative fact-finding capabilities of the prosecution, just as would an adherent of the Crime Control Model. Chief Justice Burger has chosen to view the exclusionary rule as having promoted inefficiency in the criminal process and as having blocked the societal goal of repressing criminal conduct. He felt the rule did not even inhibit the wrong-doing official. The Chief Justice quoted the plurality opinion in *Irvine v. California* for support.[85]

> Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searchers.[86]

Chief Justice Burger tended to reduce the debate over the exclusionary rule to the single issue of deterrence. The rule's foundation was not to foster judicial integrity, referred to by the Chief Justice as the "sporting contest theory," but rather to deter offi-

---

81. 430 U.S. 387, 415-29 (1977) (Burger, C.J., dissenting).

82. 403 U.S. 388, 424 (1971) (Burger, C.J., appendix to dissenting opinion). The appendix presents fifteen different articles critical of the exclusionary rule. Also included is the seminal work by Oaks, *supra* note 62, from which Burger sought an empirical foundation for his views.

83. What was directly at issue was whether Bivens had a federal cause of action for damages after a wrongful invasion of Bivens' residence by narcotics agents. It was to this issue that the majority addressed itself.

84. 403 U.S. at 416.

85. 347 U.S. 128 (1954).

86. *Id.* at 136.

cial misconduct.[87] Chief Justice Burger thought if the exclusionary rule did not deter misconduct, then it was inefficient and should be replaced. Although a pure Crime Control Model might ignore police misconduct, the Chief Justice's views have definitely validated the criminal sanction of the model. His reliance on the criminal sanction and on administrative fact finding has put Chief Justice Burger squarely in the camp of Crime Control advocates provided by the Oaks study to justify his contention that the rule fails to deter improper police conduct.[88] However, the very same study indicated that two crimes, gambling and narcotics use, accounted for the majority of the motions to suppress the evidence.[89] This aspect of the Oaks study was curiously overlooked by the Chief Justice, who was more concerned with the possibility that murders and the like might go free because of minor procedural errors. The Oaks study does not support such a conclusion.[90]

Chief Justice Burger has been consistent in terms of the Crime Control Model. Having reduced the argument to the single issue of deterrence, his only desire has been to point out the lack of efficiency inherent in the rule and to raise the spectre of murderous criminals being set free. The Chief Justice's constant reference to murderers were probably meant to be evocative of the possibility that any criminals who had committed serious crimes against property and the person might be set free.

A likely explanation for Chief Justice Burger's position would be a rationale consistent with the Crime Control Model, namely that a crime is a crime. Although Chief Justice Burger may mention murder in order to evoke his sense of outrage that guilty defendants should go free because of technical procedural errors, it is most likely that he felt that drug users, when guilty, should be punished with certainty and efficiency like any other criminals. It has been this particular reluctance to distinguish between crimes and the imposition of the criminal sanction that has been the hallmark of the Crime Control Model. Primary attention in this scheme is devoted to the orderly administration of justice. A careful look at the propriety of the criminal sanction to certain ac-

87. 403 U.S. at 415.
88. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 667 (1970).
89. *Id.* at 675.
90. 403 U.S. at 413.

tions will not be forthcoming. The criminal sanction is treated as a given. Chief Justice Burger's interest was not to question when the rule was invoked or even for what kinds of crimes, but rather to demonstrate, ". . . the suppression doctrine as an anomalous and ineffective mechanism with which to regulate law enforcement . . . ."[91]

The difficulty with the Crime Control Model in general and in particular, with the Chief Justice's view of the exclusionary rule is the lack of well defined ends (i.e., the "suppression of crime") to place alongside well articulated, administratively efficient means. Chief Justice Burger and other Crime Control Model advocates have failed to confront the empirical reality that the correlation of the exclusionary rule with drug use crimes presents.[92]

For example, Chief Justice Burger mentions drug use only once in *Bivens*, not in relation to the facts of the case or the research cited, but as a metaphor to suggest the gradual relinquishment of the exclusionary rule is like narcotics withdrawn.[93]

2. The Due Process Model

The Due Process Model is the opposite of the Crime Control Model. Essentially, the Due Process Model rejects the informal fact-finding processes of the police and prosecution as definitive of factual guilt. Rather, this model insists on formal, adversary fact-finding in an impartial tribunal, in order to eliminate or reduce mistakes to the greatest possible extent.[94] The Due Process concept is best characterized as upholding the primacy of the individual while limiting official power.[95] More importantly, the criminal, adjudicative process is viewed as the appropriate forum for correcting its own abuses.[96] Moreover, the Due Process Model exhibits a skepticism about the morality and utility of the criminal sanction in some of its applications.[97]

Two cases stand out as illustrative of the Due Process Model. *Weeks v. United States*,[98] the first case to articulate the exclusion-

91. *Id.* at 420.

92. *See* J. WILSON, THINKING ABOUT CRIME (1975); E. VAN DE HAAG, PUNISHING CRIMINALS (1975).

93. "[I]n a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be." 403 U.S. at 421.

94. Packer, *supra* note 76, at 164. The Due Process Model has focused on the possibility of human error during the fact-finding process. In a pure Due Process Model, all allegations of factual error would be determined by adjudicative hearings. Thus, the demand for finality in proceedings is in this model.

95. *Id.* at 165.

96. *Id.* at 167.

97. *Id.* at 170.

98. 232 U.S. 383 (1914).

ary rule, suggested that officials of the federal government ought not to profit from lawless behavior. Judicial integrity depends upon the government obeying its own laws. The Court stated:

> [T]he duty of giving to it [the fourth amendment] force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[99]

Even more important, from the standpoint of the Due Process Model, was the Court's insistence that the judiciary could cure the abuse of official lawlessness through the imposition of the exclusionary rule by the court's themselves. Administrative fact-finding was not to be allowed free rein and the federal courts had the prerogative to correct the abuse through application of the exclusionary rule.

The decision in *Mapp v. Ohio* appears to be more in line with the concepts of the Due Process Model.[100] The *Mapp* Court did not take a kindly view of abuses in the administrative fact-finding process. Justice Clark, speaking for the majority stated:

> Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of the law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.[101]

The *Mapp* decision incorporated all the major tenets of the Due Process Model. It demanded that administrative fact-finding be scrupulous and subject to adversary questioning. It limited official power and discretion to that strictly allowed by law. The *Mapp* holding also greatly expanded the role of the courts as the appropriate forum to correct prosecutorial abuses by insisting

99. *Id.* at 392.
100. 367 U.S. 643 (1961).
101. *Id.* at 660.

that state courts be bound by the exclusionary rule. In one final, important sense the *Mapp* decision upholds a major tenet of the Due Process Model—the skepticism about the utility of the criminal sanction. Justice Douglas, in a concurring opinion referred to the alleged crime: "[O]ne must understand that this case is based on the knowing possession of four little pamphlets, a couple of photographs and a little pencil doodle—all of which are alleged to be pornographic."[102]

One unfortunate aspect of the Due Process Model is the skepticism the model applies to the criminal sanction. In the *Weeks, Mapp* and *Bivens* decisions the Court majority was skeptical of police actions and of the underlying criminal sanction, yet the method they chose to combat both was procedural. Justice Douglas obviously did not seriously consider the pornography charge in *Mapp*, although he did see it as an opportunity to implement the exclusionary rule. It would certainly be obvious to adherents of the Crime Control Model, such as Chief Justice Burger, that the rule and other procedural devices have been used as a smokescreen by the Due Process Model advocates to shield an attempt to separate the criminal sanction from victimless crimes. In other words, although the Due Process Model advocates have not openly urged the removal of criminal sanctions from certain activities, they have resorted to various ploys that have successfully interferred with their imposition.

3. The Tension Between the Models

Although Packer had envisioned the two models of the criminal process as metaphorical or as polar opposites in order to delineate different belief systems, the unfortunate reality has been that the adherents of the two models have indeed become polarized. Crime Control advocates desire harsher sentences and swifter imposition of punishment. They have not been disposed to debate the wisdom of the criminal sanction for drug use. They have persisted in relying on alleged misinformation about drug use to buttress claims that drug use is a "national epidemic."[103] The fact that drug use crimes occupy an inordinate amount of time on court dockets, and comprise a large percentage of the motions to suppress is ignored.

On the other hand, the Due Process adherents have generally restricted themselves to rearguard procedural defenses. It is the rare authority that openly challenges the use of the criminal sanc-

102. *Id.* at 668 (Douglas, J., concurring).

103. *See* Johnson, *Once an Addict, Seldom an Addict*, 7 CONT. DRUG PROB. 35 (1978).

tion for drug use in a public forum.[104] The increasing polarity on both sides and the unwillingness to confront the basic issue of whether or not drug use should be criminal suggests the exclusionary rule must be maintained until some consensus is reached. Procedural rules have the ability to mitigate the harshness of competing views on the worth of the criminal sanction.

> Procedure is the individual's last line of defense in contemporary civilization, wherein all other associations to which he may belong have become subordinate to the state. The elaboration of procedure, then, is a unique, if fragile, feature of more fully evolved states, in compensation, so to speak, for the radical isolation of the individual.[105]

Conclusion

The exclusionary rule and drug use crimes share a common history in American Law. Although usually treated as separate topics, the rule and drug use have been conceptually and statistically intertwined. Further, the debate over the efficacy of the exclusionary rule has been precipitated by the failure of American society to satisfactorily resolve the question of drug use and the imposition of the criminal sanction for their use. The tension produced by that failure has been conceptually presented by the use of Herbert Packer's dual model of the criminal process. Until the national debate over drug use is resolved, the exclusionary rule remains the viable interim alternative.

JEROME A. BUSCH

---

104. *But see* Kurzman, *Decriminalizing Possession of All Controlled Substances: An Alternative Whose Time Has Come*, 6 CONT. DRUG PROB. 245 (1977). The authors stated:

> In addition, the present laws encourage the use of questionable investigative practices. These include entrapment, the use of undercover provocateurs and unreliable informants, manufactured or planted evidence and perjured testimony to obtain a conviction, unauthorized wiretapping, and search and seizures in violation of guidelines established to protect civil liberties. Such practices demonstrate a frightening disregard for constitutionally guaranteed rights. The passage of increasingly repressive laws which advocate such concepts as preventive detention (District of Columbia), civil commitment (California), mandatory-minimum sentencing practices (New York), and the erosion of civil liberties through increasingly expanding police power (no-knock laws, etc.), and the potential for rampant police corruption, when viewed collectively, reveal a terribly bleak picture. All told, these factors make a compelling argument against a prohibition policy which emphasizes crimes control over due process, and punitive values over remedial values.

Id. at 250.

105. Diamond, *The Rule of Law Versus the Order of Custom*, in THE RULE OF LAW 140 (P. Wolff ed. 1971).